No. 85-5915

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated

*Petitioners,*

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

*Respondent.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

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## PETITIONERS' REPLY BRIEF

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## ARGUMENT

The tenant petitioners rely largely on their opening brief (hereafter "Petitioners' brief") to rebut the arguments of the respondent Housing Authority ("Respondent's brief"). Additional rebuttal is offered in this reply brief on six points: (1) the Authority's attempt to dissociate the utility allowance regulations from the Brooke Amendment[1]; (2) the denigration of the utility allowance regulations as less than binding; (3) the attempt to portray the regulations as too vague for judicial enforcement; (4) the offering of illusory remedies as evidence of congressional intent to preclude § 1983 suits; (5) the misuse of *Sea Clammers*[2] to reverse the presumption in favor of the § 1983 remedy; and (6) the implication that *Guardians*[3] precludes a damages remedy for intentional violations of federal law.

Preliminarily it should be noted that the Authority's brief continues to misrepresent the tenant claims as a quest for "free electricity," as if to suggest that tenant petitioners seek a handout rather than something they have paid for. Neither the court of appeals nor the district court accepted this mislabeling of the issue. The electricity allowance is not "free" but is among the benefits the tenants are supposed to receive for their rent, with the balance of costs for utilities (as for other expenses) paid for by HUD's operating subsidies, 24 C.F.R. § 990.107 (1986). The electricity is ultimately "free" only to the Housing Authority, which pays for it with the money of others.

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[1] 42 U.S.C. § 1437a(a) (1981) and predecessor sections.

[2] *Middlesex Cty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

[3] *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983).

## I. THIS COURT SHOULD NOT ACCEPT THE HOUSING AUTHORITY'S INVITATION TO GUT THE BROOKE AMENDMENT BY INDIRECTION.

The respondent Housing Authority takes a dramatically different position on this case from the Fourth Circuit, and for good reason disowns much of the reasoning of the court of appeals. The alternative argument presented is no more compelling, however, and would equally permit evasion of the intent of Congress as expressed in the Brooke Amendment.

The Fourth Circuit's justification for dismissal was not lack of substantial tenant rights (under the test of *Pennhurst*[4]) but rather the erroneous conclusion that a general regulatory power given to HUD adequately evidenced an intention of Congress to preclude *any* private enforcement action by tenants regarding § 1437 public housing rights (JA 37) (under the test of *Sea Clammers*). This leap of inference, of course, would divest all public housing tenants of any meaningful federal rights. By contrast, the Housing Authority concedes that some sections of the United States Housing Act of 1937 ("USHA") may create rights enforceable under 42 U.S.C. § 1983 (Respondent's brief 18, n.11). The Authority even cites the Brooke Amendment as an example of a "clear Congressional mandate" that should be privately enforceable (*id.*, citing *Beckham* v. *New York City Housing Auth.*, 755 F.2d 1074 (2d Cir. 1985) which so held).

Having thus honored the Brooke Amendment, the Authority invites this Court to eviscerate it from another direction: by reducing the content and coverage to a meaningless minimum. The Authority's argument runs that the Brooke Amendment limits rents but does not mention utilities, nor does it expressly define rent to

[4] *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 28 (1981).



include them, so Congress must not have contemplated that any utility consumption would be provided in return for the Brooke rentals paid by tenants. The argument would focus on HUD's 1980 utility allowance regulations in isolation, denying any relationship between the admittedly enforceable Brooke Amendment and those supposedly unenforceble regulations (Respondent's brief 22-27).[5] Their wedge is too blunt for the task, for at least three reasons.

First, HUD thinks otherwise. In a brief which is extraordinarily deferential to the administrative agency whose interpretation must be accorded deference, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), the Authority neglects to recognize that HUD has always considered "rent" to include the charges to tenants for PHA-provided utilities, services and equipment as well as for the roof and four walls.[6] HUD has maintained this position in the face of PHA criticism (*see e.g.* 47 Fed. Reg. 35250 (1982)) and continues to maintain it under present regulations, 24 C.F.R. § 913.102 (1986) (defining "tenant rent").

Second, HUD's inclusion of the cost of utilities within the Brooke limits is completely consistent with what leg-

[5] The Authority relies on *Stone* v. *District of Columbia*, 572 F.Supp. 976 (D.D.C. 1983) for the proposition that "no § 1983 rights accrued to tenants under the interim utility regulations," Respondent's brief, 18 n.11. In fact the district court's opinion does not even mention § 1983, being based entirely on a defective implied rights analysis. The PHA conceded error and settled on appeal, as noted in Petitioners' brief, 15 n.12. The Authority correctly notes a HUD motion to affirm the district court decision. On September 9, 1986, the court of appeals instead vacated the district court opinion and remanded the case with instructions for dismissing the claim against HUD as mooted by payment of the tenant claims; supervision of prompt submission of remaining payment requisitions; and disposition of the claim for attorney fees under 42 U.S.C. § 1988. Judgment and memorandum opinion lodged with the clerk for the convenience of this Court.

[6] See authorities collected in amicus brief of National Housing Law Project, 8-11.

islative history shows about the intent of Congress. The Authority concedes that Congress initially included utilities among the components of rental[7] (Respondent's brief 25). The Authority correctly points out that the original USHA approach did not limit the rent a PHA could charge, or require the inclusion of utility costs within the PHA rent. What the parenthetic language does show, however, is highly germane: a congressional belief that all of a family's shelter costs should be viewed together, and seen in relation to total family income.

The Authority correctly notes that the 1959 amendment to this section removed the parenthetic exegesis on the meaning of rental.[8] There is no reason to view that amendment as intended to change what was covered by "rental." Nor was the lack of an explicit definition in the Brooke Amendment itself proof of intent to change the long standing inclusive meaning of the term. The Authority says (Respondent's brief at 25) that the Brooke Amendment's use of the word "rent" implies "shelter cost or a fee for the possessory use of the land." That begs the question; of course rent is payment connected with use of real estate. But in any rental, the character of the property, the extent and nature of the use, and the equipment and services to be provided in conjunction, are items requiring further specification. "Rent" is what the tenant pays, not what he gets for it. The Brooke Amendment's use of the term in no way requires a change in the range of shelter costs Congress had previously directed to be considered within the statutory meaning of rental.

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[7] USHA, Ch. 896, § 2, 50 Stat. 888 (1937) reads:

> The dwellings in low income housing . . . shall be available solely for families whose net income at the time of admission does not exceed five times the rental (including the value or cost to them of heat, light, water, and cooking fuel). . . .

[8] 42 U.S.C. § 1402(1), as amended by Pub. L. No. 86-372, § 503, 73 Stat. 654 (1959).



The Authority's comparison (Respondent's brief 24-25) of "rent" in assisted housing with "rent" in the Brooke Amendment draws the wrong conclusion. With regard to assisted housing, Congress included a parenthetic definition of monthly maximum rent[9] as including fees for utilities, maintenance and management, 42 U.S.C. § 1437f(c)(1) (1986). With regard to public housing, Congress did not include *any* parenthetic definition of rent, 42 U.S.C. § 1437a(a) (1986). The terms are different (monthly maximum rent versus rent); the purposes are different (one limiting return to a landlord, the other limiting cost to a tenant); the structures are not parallel (one parenthetically elaborating on rent, the other not attempting to do so). Nothing can properly be inferred from the comparison. The maxim *inclusio unius est exclusio alterius* is inappropriate; not *unius* but nothing at all is specified in the Brooke Amendment about what a tenant gets for his payment.

The third reason for linking HUD's utilities regulation with the Brooke Amendment is probably the most compelling, though not even addressed by the Authority. The Brooke Amendment would be virtually useless unless it controlled not only shelter charges, but ancillary service charges as well. The purpose of the Brooke Amendment, after all, was to make it possible for very poor people to "spend no more than 25% of their income for housing,"[10] leaving the very modest remainder free for other basic subsistence (Petitioners' brief at 18-23). This purpose is wholly thwarted when a PHA imposes unavoidable charges for necessary services associated with the physical dwelling. A HUD policy which did not require all

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[9] This is *not* generally the amount payable by the tenant, but rather the total of tenant payment plus applicable subsidy.

[10] Senator Brooke, floor statement on S. 2864, 115 CONG. REC. 26721 (1969).

essential services to be provided within the Brooke rent ceiling would itself contravene the congressional purpose. Here the regulations are an integral part of the statute, and both sources of authority together define the substantive rights of tenants.

The Authority asks this Court to pretend no such connection between rental limits and utility costs. if the invitation is accepted, the next PHA will suggest that charges for essential equipment are not limited by the Brooke Amendment, and then charges for normal building maintenance, and then for project administration, and so on until the Brooke limits become an irrelevant relic. Neither HUD nor the Fourth Circuit have read the statute that narrowly, and neither should this Court.

## II. THE HUD UTILITY ALLOWANCE REGULATIONS ARE NOT JUST "PART OF THE GIVE AND TAKE OF THE REGULATORY DIALOGUE," BUT ARE THE LAW.

While never questioning the validity or applicability of the HUD utility allowance regulations which it defied, the Authority argues that courts should not take such regulations seriously. The regulations were only an interim rule (Respondent's brief at 12). The regulations were criticized (brief at 19-21).[11] HUD soon proposed revisions for public

[11] Worthy of special note is the Authority's criticism that the allowance regulations do not encourage conservation because they are based on a past pattern of actual [read wasteful] consumption rather than an energy conscious standard (Respondent's brief at 4-5, 19). In fact the consumption data on which the Authority would have drawn (had it bothered to comply with the regulations) reflected prior actual consumption under a draconian surcharge system, where almost every tenant consumed under the disincentive of extra utility charges every quarter (see facts in brief for Petitioners at 5, 6-7). If charges to tenants are an effective means of encouraging energy conservation, then the consumption base data available to this Authority was already very energy-conservative. In any event HUD's subsequent utility allowance regulations *also* permit a PHA to base allowances on past consumption. 24 C.F.R. § 965.476(c)(i) (1986).



comments (brief at 20). HUD has discretion in the rulemaking and oversight process (brief at 21-22). "Where interim rules are at issue, there exists a danger that courts may enforce literally that which the agency intends to be part of the give-and-take of the rulemaking process" (*id.*) HUD's authority would be severely undermined if tenants could actually hold local housing officials to what HUD has promulgated (brief at 15).

The Authority's characterization is only slightly more extreme than that of the court of appeals itself, which speculated that Congress may have given HUD sole enforcement authority so that it could decide which violations of USHA to disregard. (Opinion, JA 36, n.7). Having created clear regulations describing what local authorities must do to comply with the mandate of Congress, HUD may neglect compliance, and in fact is to be expected to do so in order that the agency can thereby concentrate on more important matters.

This view of the Code of Federal Regulations and the unlimited discretion of HUD is a radical departure, which goes far beyond a recognizable counsel of judicial restraint. This case is not about HUD's enforcement discretion (the tenants never put much hope in that quarter), but rather is about whether HUD's regulations have any binding effect. Law is law, and not just the parts we like. The HUD utilities allowance regulations were the law, *see Thorpe* v. *Housing Auth.*, 393 U.S. 268, 274-76 (1969), and bound not only housing authorities and tenants but also HUD as promulgating agency, *see Service* v. *Dulles*, 354 U.S. 363 (1957). The regulations may have provoked controversy and criticism, but HUD nonetheless set an implementation deadline (24 C.F.R. § 865.482 (1983)) and chose to leave the regulations in effect for four years. At any time HUD could have utilized its reserved authority under 24 C.F.R. § 999.101 (1986) and its predecessors to waive compliance with the utility regulations if they

proved too cumbersome or flawed, in the specific case or generally. HUD did not choose to waive compliance either with regard to this Housing Authority or any other, but left the utilities regulations in full force until the latest revision superceded them, 49 Fed. Reg. 31399 (1984).

It should come as no surprise that a blatant violator of regulations should have a low opinion of the regulations violated; but it is surprising that the Authority would expect the courts to find them less than binding. The position urged by the Authority feigns deference to HUD, but would in fact destroy HUD's regulatory authority. If an agency cannot speak conclusively through its duly-promulgated legislative regulations, then it cannot mandate standards, define procedure, or compel adherence. The Authority would seize upon HUD's present tendency to regulatory anarchy (see Petitioners' brief at 40-42; amicus brief of National Housing Law Project at 41-54) and enshrine it as the law of the land. That would be no service to HUD or Congress, nor ultimately to housing authorities themselves.

## III. THE HUD UTILITY REGULATIONS ARE QUITE SPECIFIC ON THE FORMULATION OF ALLOWANCES, AND THE AUTHORITY'S ALLEGED DIFFICULTIES IN COMPLIANCE ARE MERELY SPECULATIVE.

The Housing Authority argues (Respondent's brief at 15-17) that the procedure and standards in HUD's 1980 utility allowance regulations are too vague to establish rights or be enforced by a court. This Authority, on these facts, could hardly be in a worse posture to make the argument, even if it were plausible.

First, as to procedure: nothing could be more routine in court review of agency compliance than determining whether certain mandated procedural steps were followed.[12] The HUD utility allowance regulations have many familiar procedural features: collection of data from specified sources (24 C.F.R. § 865.476 (1983)); determination by a prescribed formula (§ 865.477(a) through (d)); notice to tenants with an opportunity to comment (§ 865.473(a)); submission to the regulatory authority (§ 865.473(a); publication of the allowances as part of rent schedules (§ 865.479); periodic review and revision (§ 865.480). It takes no technocrat to decide whether these basic steps have been followed. Since the Housing Authority undertook *none* of these mandated steps (see Petitioners' brief at 4-5), its protest of their immense difficulty must be taken with some scepticism.



Nor are the substantive standards imposed for calculations of allowances so esoteric and discretion-ridden as to defy judicial review. There are four prescribed steps in the calculation required by 24 C.F.R. § 865.477 (1983). First, consumption data for each size apartment is listed in order, lowest to highest. No discretion at all there.[13] Second, the PHA is to exclude unusually high consumption figures which would skew the computation. Some discretion there, but only at the margin. Third, if the data covers a multi-year period, then it is to be averaged (no discretion) and adjustment made for abnormal weather (again a very modest discretion). Finally, allowances are fixed at the level which "can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." Once the preceding steps have been completed, there is virtually no room for discretion in this final stage.

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[12] *See e.g.* Administrative Procedure Act, 5 U.S.C. § 706(2)(D).

[13] Review of this stage, the Authority complains, "would necessitate examination of the personal consumption habits of 1,100 households" (Respondents brief at 17). This spector of onerous, privacy-invading data collection is actually a mechanical listing function performed from existing consumption records.

The required calculation is based on *retrospective* data; the goal is an allowance adequate *prospectively* for 90% of the units. The method can necessarily be more precise than the result as applied: this explains the use of "about 90%" rather than "exactly 90%" in § 865.477's statement of the goal of the allowances. A precise outside parameter for error is established by § 865.480(b)'s requirement for review if more than 25% of units in a category are charged in a quarter.

Of course, there is some discretionary PHA input under the utility allowance regulations: such factors as local weather and wasteful tenant consumption will obviously vary from project to project. Variable inputs do not in themselves render a mandatory formula unenforceable, nor so obscure as to require vast technical competence. The local variables are not the essence of some "coherent national housing policy" as the Authority curiously implies (Respondent's brief at 15); the utility allowance regulations *are* the national housing policy, and the local variables but a modest concession to make the national policy feasible. And again, the Authority's argument that this standard is beset with discretionary loopholes is completely without basis in the record. All we know of the Authority's effort is that there was not one. This suit does not attack an abuse of discretion, but the failure to perform a mandatory duty.

Finally, the Authority's argument on this point characatures the division between judicial and regulatory competence. There is no regulation that does not presume some variable input, and courts can afford some deference to an administering agency's expertise and experience without abdicating the judicial duty to uphold the law.[14]

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[14] *See e.g. Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965) (reviewing courts must not "rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").



Here the HUD utility allowance regulations afford a perfectly adequate standard against which to measure the compliance not just of this Housing Authority, but even of a PHA which actually sought to comply.

## IV. THE MAJOR COMPONENTS OF THE "COMPREHENSIVE ENFORCEMENT SCHEME" RELIED UPON BY THE AUTHORITY ARE ILLUSORY.

In its brief at 28-32, the Housing Authority tries to construct a "comprehensive enforcement scheme" to meet the test of *Sea Clammers* for § 1983 preclusion. This effort is essential to its cause because the Fourth Circuit opinion does not ever examine that standard with regard to the Brooke Amendment. By contrast, the Second Circuit in *Beckham* v. *New York City Housing Auth.*, 755 F.2d at 1077, specifically held that § 1983 was not precluded for enforcement of Brooke because the Brooke Amendment "contains no comprehensive enforcement mechanism to enforce statutory rent limitations."

To overcome *Beckham*, the Authority must show, not only some generalized administrative power, but remedies specifically appropriate for Brooke violations. The Authority has failed to do so. Instead of showing that *Congress* has erected appropriate remedies, the Authority attempts (Respondent's brief 28-30) to patch together various *HUD* measures into a remedial scheme. And the key offerings which might bear some relation to congressional intent—the power of HUD to withhold funds and the tenant grievance mechanism—do not withstand scrutiny as remedies for Brooke violations.

The Authority argues (Respondent's brief at 29) that although Congress has denied HUD the remedy of withholding federal funds pledged as security for *construction* bonds, HUD can terminate *operating* funds to get a PHA's attention. That is not the method of Congress or

the policy of HUD. In its authorization for payment of operating subsidies to PHAs, Congress specified in 42 U.S.C. § 1437g(a)(1):

> The Secretary shall embody the provisions for such annual contributions in a contract *guaranteeing their payment subject to the availability of funds*. . . .[emphasis added]

"Guaranteeing" obviously adds a mandatory quality to the granting of funds on an annual basis. The only specified justification for failure to continue the subsidies is lack of HUD funds—a failure of Congress itself to appropriate adequate sums. This is a context where *inclusio unius est exclusio alterius* does properly apply. When Congress specified a single condition for terminating operating funds, it rejected all others.

HUD has established the "standards for costs . . . and projections" to calculate operating subsidies, as required by § 1437g(a)(1), in its regulations on the Performance Funding System.[15] In those regulations HUD reserved to itself the authority to withhold or reduce operating subsidies in the event of "insufficient funds" (24 C.F.R. § 990.113(c)) and in only two other circumstances: (1) where a PHA fails to adhere to the statutory requirement that aggregate rentals shall not be less than one-fifth of all income of all the resident families (24 C.F.R. § 990.114); and (2) where a PHA fails to conduct required reexaminations of family income (24 C.F.R. § 990.115).[16] HUD did not reserve the authority to terminate or withhold for Brooke violations or any other PHA transgressions.

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[15] First established in 1976 and presently designated as 24 C.F.R. § 990.101 through § 990.120 (1986), the same "PFS" regulations were effective all during the period here in question.

[16] Presumably HUD believed these conditions were justified as definitional aspects of "such annual contributions" under 42 U.S.C. § 1437g(a)(1).



HUD's limited view of its withholding power is explained in a 1981 policy directive to HUD regional staff. In HUD Notice H-81-60, "PHA Compliance with HUD Requirements, Housing Management Operations, Low Income Public Housing Program," issued 10/26/81,[17] HUD explained (at p. 8):

> There are both operational and legal reasons why payment of operating subsidies should *not* be withheld or reduced to enforce compliance with HUD requirements other than those specifically mentioned in the PFS regulations.
>
> Operationally, the problem is that a reduction of operating subsidy payments generally would have an immediate impact upon a PHA's capacity to provide services to its residents that are necesary to maintain the required decent, safe and sanitary standard. From a legal viewpoint, the General Counsel has determined that, although there is no statutory obstacle to doing so, HUD has not established the contractual and regulatory background needed for imposition of this sanction.

While it is far from clear why HUD's General Counsel found § 1437g(a)(1)'s contractual gurantee "no statutory obstacle," the directive's message is clear: HUD itself does not view termination of federal funds as an available remedy for PHA violations of the sort involved here.[18]

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[17] Relevant portions have been deposited with the Clerk for the convenience of the Court. This directive bore an automatic sunset date of 4/30/82 but is believed to represent the continuing policy of HUD and is entirely consistent with HUD's litigation position in Brooke Amendment cases. See Petitioners' brief at 41.

[18] HUD's contractual authority to freeze PHA bank deposits, Annual Contributions Contract § 401(F)(R30), is not proof of the contrary. The deposits which can be frozen are not just federal contributions but *all* PHA funds, § 401(B). This power is a necessary ancillary to HUD's rarely-used right to take possession of and operate a housing project in the event of substantial default by a PHA, §§ 501, 505.

Whatever the shortcomings of the HUD notice, it does show an appropriate sensitivity to a recurring concern of this Court about excluding private remedies in grant programs: the devastating effect of funding cutoffs on the end beneficiaries. As Justice White noted in dissent in *Pennhurst*, 451 U.S. at 52:

> This Court is "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program[s]" even if the agency has the statutory power to cut off federal funds for noncompliance. *Rosado* v. *Wyman*, 397 U.S. 397, 420 (1970). In part, this reluctance is founded on the perception that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act.

In this case cutoff of PHA operating funds would be especially counterproductive: Congress established the federal operating subsidy specifically to make the Brooke Amendment's rent limits feasible! It would not only deny the statutory language, but utterly confound the specific statutory purpose, to credit the cutoff remedy postulated by the Authority and the Fourth Circuit.

The Authority's argument for the tenant administrative grievance mechanism (Respondent's brief at 31) has been largely anticipated (Petitioners' brief at 36-37). Since the filing of the tenants' brief, HUD has once again disowned the Authority's position.[19]

In response to Congress' 1983 statutory mandate for grievance hearings, 42 U.S.C. § 1437d(k) (1986), HUD

[19] And that of the Eleventh Circuit in *Brown* v. *Housing Auth.*, 784 F.2d 1533 (1986). Two of that panel thought the grievance mechanism would be available to complain of allowances, 1537-8 at n.5. The dissenting judge found this to be inadequate evidence of congressional intent to preclude, 784 F.2d at 1542. The majority opinion otherwise simply adopts the Fourth Circuit's flawed reasoning in this case.



recently published revised hearing regulations for comment. 51 Fed. Reg. 26504 (1986). The Authority read the legislative history of the grievance provision as contemplating a broad coverage of "all disputes" between the PHA and tenant; HUD specifically rejects that interpretation, 51 Fed. Reg. 26516, because it relates to an earlier version of the measure, not that which finally passed. The HUD proposal restricts the mechanism to review of "proposed PHA adverse action," § 966.30, 51 Fed. Reg. 26528, and explains:

> PHA action or non-action concerning general policy issues or class grievances (including determination of the PHA's schedule of allowance for PHA furnished utilities . . .) does not constitute adverse action by the PHA, and the PHA is not required to provide the opportunity for a hearing to consider such issues or grievances.

§ 966.31(a)(2), 51 Fed. Reg. 26528. In short, the grievance mechanism affords no remedy—class or individual—for Brooke violations such as these. The Authority's position is again opposite to that of the administering agency to whom it urges deference.

For these reasons and those previously urged, there is no merit in the argument that Congress created a "comprehensive enforcement scheme" which precludes the § 1983 remedy.

## V. WHILE CONCEDING THE PRESUMPTION THAT A § 1983 ACTION IS NOT PRECLUDED, THE HOUSING AUTHORITY URGES A STANDARD THAT WOULD REVERSE THE PRESUMPTION AND RENDER § 1983 REDUNDANT.

In its haste to avoid § 1983 the Authority quite disregards the facts and actual holding of this Court in the *Sea Clammers* decision which elaborated the § 1983 preclusion rationale. Faced with the possibility of both an

implied and a § 1983 remedy, the Court in that case did *not* use the same framework of analysis for the two approaches. Justice Powell's opinion for the Court recognizes (453 U.S. at 19) the preferred standing of § 1983's express congressional authorization to sue, and found evidence of congressional intent to override § 1983 sufficient only because Congress "created so many specific statutory remedies including the two citizen-suit provisions." 453 U.S. at 20. This case is at the far extreme—*no* authority for citizen suits, and *no* statutory remedies other than a generalized regulatory authority of HUD which cannot be triggered by tenants. (Petitioner's brief at 35-42). It is not *Sea Clammers* itself which has made § 1983 litigation so confusing but the eager overreading of the decision by public defendants and now, regretably, courts such as the Fourth Circuit. That malady can be corrected without the major transplantation surgery advocated by the Authority; recognition of the presumption that operates in favor of § 1983 should restore that remedy to health.

The Authority's brief (at 32) concedes the presumption that § 1983 is available for private enforcement of federal statutory rights. Like the lower courts, however, the Authority ends up essentially merging the § 1983 and implied right of action tests, *Cort* v. *Ash*, 422 U.S. 66 (1975), which has the effect of nullifying or even reversing the presumption. This approach renders § 1983 redundant, even in its special context of actions against state and local officials, and implicitly overrules *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). The merger approach has never been endorsed by this Court, and is rejected even by the commentary which the Authority cites for it.[20]

[20] Respondent's brief at 36 claims support for use of the *Cort* v. *Ash* tests in the § 1983 context from Brown, "Whither *Thiboutot*? Section 1983, Private Enforcement, and the Damages Dilemma," 33 DEPAUL L. REV. 31, 57-58 (1983). But Professor Brown, though a harsh critic of *Thiboutot*, ultimately rejects the merger of the *Cort* v. *Ash* and § 1983 tests (at 63-64) in favor of a narrowing interpretation of "and laws" (at 64-66) which was specifically rejected in *Thiboutot*.



A proper use of the presumption creates a burden of proof on the defendant to show just what *Sea Clammers* called for—explicit proof of Congressional intent to preclude, generally demonstrated from the remedies and enforcement mechanisms in the statute. The presumption is overcome, of course, if the statute contains an express bar, or as in *Sea Clammers*, if the remedial devices expressly provided are sufficiently comprehensive. The mere existence of some remedy, of some general administration responsibility (as here), or congressional silence simply cannot carry the day against § 1983's express authority to sue. In the implied rights context a defendant does not carry the burden; if congressional intent remains ambiguous, the proponent loses.

Upon the evidence of congressional intent in this case, the tenants should have a right to sue under any reasonable test the court may apply or adopt. But the implied right tests, and indeed the entire discussion of *Cort* v. *Ash*, should have been superfluous here; an implied right of action was never urged by the tenants. In a suit on federal law against a local governmental defendant, § 1983 should always be an easier route[21]; that is the meaning of *Thiboutot*, and it bears repeating to the Fourth Circuit.

## VI. THE *GUARDIANS* CONSIDERATIONS FOR § 1983 DAMAGES DO NOT APPLY TO INTENTIONAL AND PERSISTENT VIOLATION OF A FEDERAL LAW WHICH GRANTS SPECIFIC RIGHTS TO BENEFICIARIES.

The Authority would deny the restitution of tenant surcharge payments in this case upon the conclusion of

[21] *Cf. Pennhurst*, Justice White's opinion, 451 U.S. at 51 (in wake of *Thiboutot*, all parties agreed that the implied rights decision below should be considered on § 1983 grounds on appeal).

Justice White's opinion in *Guardians* that damage awards are not available to redress unintentional discrimination in employment under Title VI, 463 U.S. at 596. By its own terms the *Guardians* rationale is inapplicable here. The tenants have already pointed out (Petitioners' brief at 42-43) that the Authority's violations here were indisputably intentional; that the restitution sought is neither federal nor state money but tenant money; and that the funds are readily available to the Authority from its escrow or by adjustment of its HUD contributions.

The public housing program at issue here bears other notable distinctions from ordinary federal-state grant programs. Since there is no local or state government money in the program, those governments will not face the sudden imposition of tax burden that was a concern in *Guardians*. A reallocation of additional federal dollars on account of this suit would not frustrate, but merely achieve, the purposes of USHA generally and the Brooke Amendment specifically.[22] Nor is there in USHA any alternative private remedy, like the private suit for enforcement of Title VI in *Guardians*; here the § 1983 claim is not a tag-along or parallel to a statutory remedy, but the most direct source of relief.

Justice White's exclusion of intentional violations from the reasoning of his *Guardians* opinion is entirely consistent. Intentional decision presumes that the public agency was fully aware of the governing condition which it chose to disregard (as was the Authority here, Petitioner's brief, 4); it is not suddenly being faced with some

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[22] Worth noting is that HUD has not recently experienced a shortage of operating subsidy funds, but rather a recurring surplus. U.S. Dept. of HUD, Fiscal Year 1987 Budget (Feb. 1986), PH-7 (carryover from 1986 estimated at $61.3 million after Gramm-Rudman sequestration); FY 1986 Budget (Feb. 1985), PH-7 ($253 million carryover); FY 1985 Budget (Feb. 1984), PH-7 ($355 million carryover); FY 1984 Budget (Jan. 1983), H-27 ($196 million carryover for FY 1983, $597 million for FY 1982).



*ex post facto* requirement which might have caused it to reject federal funds. Similarly, a public agency which deliberately disregards federal law cannot claim surprise that there are financial consequences of that decision. Presumably it weighed the risks before stepping over the line. Thus there is no derrogation of the state or local option to choose participation in a spending power grant program.

Finally, attention must be paid to a distinction drawn by Justice White in his *Pennhurst* opinion, 451 U.S. at 53, between a grant recipient's rights to terminate future obligations by withdrawing from the program, and the need to honor those statutory obligations "already accrued." Here and in most damage claims, past noncompliance is not cured by withdrawal. A damage remedy in appropriate circumstances recognizes that distinction.

The damages sought in this case are not some ephemeral measure of the value of an abstract right, *Memphis Community School Dis.* v. *Stachura*, 477 U.S. ___, 54 U.S.L.W. 4771 (1986), or a merely procedural deprivation causing no actual loss, *Carey* v. *Piphus*, 435 U.S. 247 (1978). The damages sought here are compensatory special damages in the most narrow sense. What the tenants lost was their own hard cash, extracted illegally from very meager incomes under explicit or implicit threat of eviction from public housing. The Housing Authority continued to collect the surcharges long after the claim of their illegality, and agreed to an internal escrow of at least a part of the funds collected (R33). Basic fairness here supports the recovery of those funds by the damage remedy generally available under § 1983.

## CONCLUSION

The Housing Authority's highly technical defenses to this action studiously disregard the compelling summary judgment record on the central and undisputed fact: a public authority chose to run its public housing in deliberate disregard of statutory, regulatory and leasehold imperatives, so that it could extract more money from its tenants than Congress and HUD wanted them to pay. Nobody was hurt except the tenants, and the foundation principle that public institutions should not be above the law. Evidently nobody seeks to redress either loss except these tenants. The defiance of federal law here is as deliberate, as clear, as specific, and as persistent as any court is likely to find, making this a quintessential case for application of the § 1983 remedy. If § 1983 fails here, it falters everywhere; and with it, in Justice Blackmun's words,[23] "the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful." This Court must assure that does not occur.

Respectfully submitted,

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[23] Blackmun, "Section 1983 and Federal Protection of Individual Rights," 60 N.Y.U.L. REV. 1, 28 (1985).